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10-162

No. _____

In The

SUPREME COURT OF THE UNITED STATES

JUAN ZALAZAR,
PETITIONER

VS.

NEW JERSEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented For Review

1. Whether the trial court's failure to inquire as to petitioner's awareness of the potential for post-incarceration civil commitment, coupled with its advice to him that he would be released on parole after four years, rendered the guilty plea violative of due process and involuntary?
2. Whether defense counsel's specific misadvice to petitioner that civil commitment would not apply to him post-incarceration violated due process and rendered the plea involuntary?
3. Whether petitioner was denied effective assistance of counsel because of misadvice that the conviction obtained by virtue of the guilty plea could not be used as the predicate offense for his civil commitment?
4. Whether due process requires that petitioner be permitted to withdraw his clearly involuntary plea to correct a manifest injustice?
5. Whether the state court erred and violated due process in ruling that petitioner's Post-Conviction Relief application was time-barred?
6. Whether this Court's opinion in **Padilla v. Kentucky ___ U.S. ___, 130 S.Ct. 1473 (2010)**, requires that a person pleading guilty to a sex offense be specifically advised of the possibility of post-imprisonment civil commitment?

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## Opinions Below

The Order of the New Jersey Supreme Court denying certification is appended to this Petition as Appendix A. The Order is unpublished. The decision of the New Jersey Superior Court, Appellate Division is appended to this Petition as Appendix B. The opinion is unpublished.

## Jurisdiction

The jurisdiction of the Supreme Court to review the final judgment of the New Jersey Supreme Court is based on **28 U.S.C.A.§ 1257 (a)**.

## Constitutional, Statutory and Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

## Statement of the Case

### i. Procedural History

Passaic County Indictment No.00-05-0474-I charged petitioner Juan Zalazar with: second degree sexual assault (Count One); fourth degree criminal sexual contact (Count Two), and third degree terroristic threats (Count Three). He entered a **retraxit** plea of guilty to second-degree sexual assault. In return, the State agreed to dismiss Counts Two and Three and recommend a

seven year NERA sentence, 85% to be served prior to eligibility for parole. The plea also mandated an evaluation at the Adult Diagnostic and Treatment Center (ADTC). The court indicated that it would consider a 4 year sentence to ADTC if petitioner qualified for it. On February 3, 2001 the court imposed sentence. It noted at the outset that "the ADTC report stated that petitioner's conduct was "repetitive, [and] compulsive behavior." The court imposed a term of 4 years incarceration "to be served at [ADTC]." Petitioner was required to serve 85% prior to being eligible for parole. Final Judgment was entered on May 15, 2001.

On October 22, 2003 the State filed a Petition for Civil Commitment. The guilty plea was used as the predicate offense. On June 2, 2005 the court ordered civil commitment. Notice of Appeal was timely filed. The Appellate Division affirmed. On May 9, 2007 petitioner filed a Motion to Withdraw Plea and Petition for Post-Conviction Relief. A hearing was conducted on March 14, 2008. On April 11, 2008, the court denied both the Motion and the Petition. Notice of Appeal was filed on May 19, 2008. The Appellate Division affirmed. Notice of Petition for Certification was timely filed and thereafter denied.

**ii. Introduction**

Petitioner entered a plea of guilty to second-degree sexual assault. The court inquired as to petitioner's knowledge of the possibility of post-ADTC civil commitment for up to life. The court specifically represented to petitioner that any form of confinement would not extend beyond four years prior to his release on parole. The

court's failure to make an inquiry as to petitioner's awareness of the post-ADTC consequence of possible civil commitment was exacerbated by additional misadvice of counsel. Defense counsel unequivocally misadvised petitioner that he could not be exposed to post-imprisonment civil commitment.

Contrary to the court's utterances as to the length of confinement, and defense counsel's definitive misadvice, petitioner has been subjected to actual civil commitment which may extend up to life. The instant sexual assault offense was utilized as the predicate offense. The court's inexcusable omission to inquire as to petitioner's understanding was fatally compounded by the abject misstatement of the law imparted to him by defense counsel.

## iii. Factual Background

### a. Pertinent Proceedings

#### A. The Plea Hearing

The prosecutor set forth the terms of the negotiated resolution. Petitioner agreed to plead to second-degree sexual assault, in return for the State's promise to dismiss Counts Two and Three. The State further agreed to recommend that any custodial sentence not exceed a seven year term, 85% of which has to be served prior to any release on parole. Petitioner was also required to submit to an ADTC evaluation. The prosecutor did not mention the possibility of a post-ADTC civil commitment.

Petitioner admitted to acts of sexual penetration which were the product of force or coercion. Defense counsel then effected an additional inquiry. Defense counsel made specific inquiry of petitioner as to waiver of his rights: (1) to require the State to prove guilt beyond a reasonable doubt; (2) to remain silent, and (3) to confront witnesses against him. Other potential consequences were also raised or repeated, including: (1) the period of parole ineligibility; (2) the court's right to reject the plea, and (3) the required ADTC evaluation. There was no advisement by defense counsel on the record regarding the lack of possibility of post-ADTC civil commitment.

The court promised petitioner that in fixing an appropriate sentence it would consider a term one degree lower. The court further instructed petitioner that the four-year period of incarceration would be served at ADTC if "you're determined to be eligible." The Court made no reference to the possibility of post-ADTC civil commitment.

The prosecutor thereafter placed on the record that "defense counsel and the defendant also filled out a Megan's law plea form." He further stated "[petitioner] acknowledges that he must register as a sex offender." To reinforce this concept, the trial court stressed petitioner's duty to "register and be supervised for life as a sex offender".[1]

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[1] Petitioner also signed the form titled "Additional Questions For Certain Sexual Offenses." The form relates predominantly to ADTC. The final question states "you may

## B. Sentencing

On February 2, 2001 petitioner and defense counsel appeared for sentencing. The parties were advised by report that petitioner met the requirement to be sentenced to ADTC. Defense counsel requested that the court sentence petitioner to a four-year term to be served at ADTC. The court subsequently imposed "a [four year] term...to be served at the ADTC."

The court further noted the period of parole ineligibility and calculated the actual sentence as requiring petitioner to serve "three years five months and ten days before being eligible for parole." No reference was made to the possibility of post- ADTC release civil commitment. Sentencing concluded with the court's assessment as to when petitioner could anticipate his release from custody. The court stated:

I expect on the four years, you may very well serve the entire four years before being placed on parole.

## C. The Petition For Civil Commitment

Petitioner was scheduled to be released from custody on November 8, 2003. On October 22, 2003 the State filed a Petition for

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upon completion of your term of confinement by (sic) involuntarily committed to another facility if the court finds, after a hearing, that you are a sexually violent predator in need of involuntary civil commitment." No inquiry was undertaken at any time concerning petitioner's understanding of this document and the answers on it. Further, it did not adequately advise any defendant of the potential consequence of civil commitment for life.

Civil Commitment. The State used the conviction herein as the predicate offense for the petition. The State's petition was granted.

### D. The Motion To Withdraw The Plea and PCR

#### 1. The Hearing

The court conducted an evidentiary hearing respecting the Motion to Withdraw Plea and Petition for Post-Conviction Relief at issue. Petitioner adduced testimony from the attorney who represented him during the plea process. He also testified himself. Both confirmed that petitioner was misadvised by counsel that the law pertaining to civil commitment for life was not applicable to him.

#### (a). Curtis LaForge, Esq.

LaForge represented petitioner "in the context of entering the guilty plea." The anticipation was that petitioner would receive a sentence of four years to Avenel. The four year Avenel sentence was also contemplated as being within the No Early Release Act (NERA). And, the plea forms embodying the agreement contained "Additional Questions for Certain Sexual Offenses."

As is pertinent hereto, the inquiry denominated Question No. 8 on that portion of the form stated:

> Do you understand that if you are confined at the Adult Diagnostic and Treatment Center, or any other facility for commission of a sexually violent offense,

> you may upon completion of your total confinement be involuntarily committed to another facility, if the Court finds, after a hearing, that you are a sexually violent predator in need of involuntary civil commitment.

LaForge testified that he reviewed Question No. 8 with petitioner. He advised petitioner that the form of civil commitment statute referred to therein did not apply to him. LaForge stated:

> This [was] the first time I had ever seen this form, because it was brand new I believe I said to [petitioner], I did not think it would apply to him, because my understanding at that time, was this was the type of commitment that would have to do with sexually violent people, people of a repetitive nature.

LaForge stated further that petitioner would have rejected the plea offer if he understood post-incarceration civil commitment to be a possibility.

LaForge did not advise petitioner that the civil commitment referred to could be for up to life. LaForge stated that he too was unaware of this fact. LaForge testified "I did nothing more than read the form to [petitioner]." Laforge did not know that the "sexually violent predator act" existed until he read the plea form. Nevertheless, "[his] advice [to petitioner] was, I don't think it

applies to you."[2] In this context, LaForge emphasized his understanding was that the Act did not apply "especially since [petitioner] wasn't [previously] convicted of a sexual offense at that time."[3]

**(b). Petitioner's Testimony**

Petitioner described the State's initial offer relative to a negotiated disposition. He stated:

> Mr. LaForge explained to me that the State was offering an 8 year sentence where a new law that had just been passed called NERA, the No Early Release Act, stated I had to do 85% of the 8 years. I didn't accept the plea bargain. I wanted to go to trial.

In the interim, petitioner's biological mother died and he redirected his life. He discussed these behavioral modifications with his adoptive mother. Petitioner also considered his antecedent relationship with the victim in

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[2] On cross-examination LaForge iterated that this was the first time he had reviewed the form. And, this was his first plea proceeding wherein the defendant pled guilty to a Megan's law offense.

[3] The court made extensive use of the Avenel Report. It contained information germane to assessing the applicability of civil commitment. However, LaForge did not review the Avenel Report until after the plea and prior to sentencing. So too, LaForge's review of the Avenel Report did not make him "aware [that] it was misadvice to state that the Act was inapplicable." LaForge testified that had he become aware at anytime that he misadvised petitioner, "[he] would have corrected it."

deciding to resolve the matter by means of negotiation. He stated:

> Numis Rubio, who is the victim, because she knew my mother, we were in a relationship [and] she was my girlfriend for about six months...We [didn't] want to go through taking them to court, or you know, the embarrassment...So we came back and asked Mr. LaForge [to negotiate] a plea agreement.

LaForge negotiated an agreement and presented it to petitioner. Petitioner agreed to accept it. Petitioner and LaForge discussed Question No. 8 and its reference to civil commitment. Petitioner pointedly asked LaForge "What exactly does this mean?" LaForge responded "Don't worry about it, that does not apply to you." Petitioner testified "[These] were his exact words." Petitioner stated:

> My understanding was that I had to have three of the same charges...a career criminal type thing, to fall under this.

Petitioner was not apprised of the law and its scope until "very close to [his] maxout date." Specifically, petitioner learned that the Act "did apply to anybody convicted of a sex crime." Petitioner contacted the office of the Public Defender and was thereafter advised that any PCR application would be premature, in the absence of institution of actual civil commitment

proceedings. Petitioner was led to believe that the five-year period of limitations commenced five years after his actual civil commitment.

On cross-examination petitioner further stated that he did not perceive any reason to ask either the court or prosecutor during plea proceedings to explain Question No. 8. It had been addressed by LaForge. Petitioner stated:

> I [didn't] see the need to ask anyone, because my attorney specifically told me that it did not apply to me...So I didn't feel the need to have to ask anyone, because as far as I knew and I understood, everything there was alright. That law didn't apply to me.[4]

**b. The Decision**

The court denied the Motion to Withdraw and the PCR. The court stated:

> [Petitioner] argues he was advised the five (5) year bar to filing a Post-Conviction Relief application pursuant to **N.J.C.R.3:22-12(a)** would not commence until the civil commitment procedure was final or

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[4] Petitioner stated further:

> [LaForge] never explained to me civil commitment means this...he never explained any of what the actual commitment was. The only thing that he explained to me was that it did not apply to me. Even after the conversation, I still didn't know what civil commitment was.

until April 8, 2007, the date of the Appellate Division's affirmance. This Court does not find the [petitioner's] testimony in this regard to be credible.

Further, the plea form executed by petitioner on September 26, 2000, paragraph 8 (D1-Evid.) sets forth that as a result of [petitioner's] guilty plea "you may upon completion of your term of confinement be (misspelled "by") involuntarily committed to another facility if the court finds after a hearing, that you are a sexually violent predator in need of involuntary civil commitment." Petitioner contends that at the time he signed the plea that he was unaware he could be civilly committed and advised by counsel that this provision of the law did not apply to him.

Even assuming the Court would agree with [petitioner's] allegation in this regard, the [petitioner] knew he was subject to civil commitment pursuant to the Act when the Petition for Civil Commitment was filed on October 22, 2003 and/or the Order for Temporary Civil Commitment was entered on October 30, 2003, this was well within the five (5) year bar of **N.J.C.R.3:22-**

**12(a).** The Order of Civil Commitment was entered on June 2, 2005 again well within the five (5) year bar.

. . . . . .

Further, the [petitioner] testified that in April 2003 or in any event during the first half of the year 2003, while at the Avenel Diagnostic Center he became aware that he was subject to possible involuntary civil commitment.

This Court finds the [petitioner] has failed to demonstrate any facts amounting to excusable neglect that may preclude proper application of **N.J.C.R.3:22-12(a).** Without sufficient evidence of excusable neglect, this petition for Post-Conviction relief is time-barred.

Another factor for consideration is the prejudice to the State.

On September 26, 2000, when the [petitioner's] guilty plea was entered, the prosecutor set forth on the record that the victim was present and reluctant to cooperate...Now, seven

and one/half years later setting aside [petitioner's] "Guilty Plea" would certainly cause prejudice to the State with a reluctant victim.

The [petitioner] also seeks to withdraw his guilty plea on the basis that he was mis-advised by his attorney at the time the plea was made.

. . . . . .

In the present case [petitioner] alleges trial counsel specifically advised him at the time of his guilty plea that the possibility of civil commitment under the "Act" would not apply to him. [petitioner] contends that had he been so advised there was a possibility the "Act" would apply to him he would not have entered his guilty plea.

[I]n the present case, [petitioner] filled out multiple plea forms acknowledging the offense he was pleading guilty to and the rights he was waiving by pleading guilty. Most importantly, [petitioner] acknowledged and signed the "Additional Questions for Certain Sexual Offenses" form (D-1 Evid.)

which includes in paragraph 8 an explanation to the petitioner that there is the possibility. At the entry of his plea on September 26, 2000, [petitioner] acknowledged under oath that he went over the plea form with his attorney and he understood the plea form.

Further, [petitioner] testified his attorney told him that the "Act" including civil commitment did not apply to him. The Court does not find this credible when in fact the petitioner circled "Yes" in response to question 8 on the Additional Questions for Certain Sexual Offenses form (D1-Evid). If it were true his response would have been "No." The more credible testimony is that of his attorney, Mr. LaForge, who testified before this Court at one point in his testimony that he advised [petitioner] that he did not think the "Act" or civil commitment applied to the [petitioner] in that the "Act" was meant to apply to sexually violent people and people of a repetitive nature. The operative words are "did not think" which means the "Act" could apply to the petitioner and corroborates why the

> [petitioner] answered "Yes" to the question 8.[5]

The Appellate Division affirmed. See, Appendix B. The New Jersey Supreme Court denied Certification. See, Appendix A.

## Reasons For Granting The Petition

### Point I

### Due Process Required That Petitioner Be Permitted to Withdraw His Plea

Petitioner entered a plea of guilty to second-degree sexual assault in New Jersey state court. An evaluation at ADTC resulted in the recommendation that he be sentenced as a compulsive and repetitive sex offender. The court imposed an ADTC sentence in the range of an offense one degree lower (third degree). Prior to petitioner's completion of the sentence, the State sought his civil commitment for up to life. The court granted the application.

At the plea and sentencing proceedings, defense counsel, the court and the prosecutor referred to an inexhaustive panoply of rights

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[5] A review of LaForge's testimony in its entirety demonstrates the insubstantial nature of the court's focus on a subtle semantic extracted from a single line within it. LaForge testified under oath without equivocation or qualification that he advised petitioner that the Act does not apply to him.

waived by petitioner. None of the references related to the possibility of civil commitment. Simply put, the record of the plea and sentencing is silent concerning any admonition and/or advice respecting use of the conviction herein as the predicate offense for a Petition for Civil Commitment.

Contrary to the concept that civil commitment could potentially be applied to him, the court had misadvised petitioner that he would be released on parole after four years in custody. In this context, the court's final unqualified statement to petitioner at sentencing was "I expect on the four year [sentence], you may very well serve the entire four years before being placed on parole." The misadvice of the court, and counsel's and/or the prosecutor's failures to correct it, render the plea involuntary and outside petitioner's reasonable expectations.

Indeed, it should be emphasized that defense counsel reinforced the misadvice with a clear statement to petitioner outside the record that the Act would not apply. Petitioner would not have entered a guilty plea with knowledge of the clearly material potential consequence of exposure to civil commitment for a period of up to life. Due process mandated that petitioner be permitted by the court below to withdraw his plea. This Court must so find.

## I. Applicable Law

### A. The General Concept

**State v. Nichols, 71 N.J. 358, 361 (1976),** sets forth the state court's general legal principles respecting misadvice, and/or lack of advice, which

impacts upon a criminal defendant's decision to enter a guilty plea. Misadvice vitiates the voluntariness of a plea. The Court in **Nichols** stated:

> Where the responsible arms of the judicial and law enforcement establishment, together with defendant's own counsel, have misinformed him as to a material element of a plea negotiation, which the defendant has relied thereon in entering the plea, as we conclude was here the case, it would be manifestly unjust to hold the defendant to his plea. **[71 N.J. supra at 361]**. (emphasis added).

See, **State v. McQuaid, 147 N.J. 464 (1997)** (A guilty plea must be entered under circumstances showing that it was made truthfully, voluntarily, and understandingly).

**B. Timeliness**

**N.J.Ct.R. 3:21-1** governs the timeliness of a motion to withdraw a plea. The rule states:

> A motion to withdraw a plea of guilty or non vult shall be made before sentencing, but the court may permit it to be made thereafter to correct manifest injustice.

See, **State v. J.J., 397 N.J. Super. 91,99 (App. Div. 2007), State v. Luckey, 366 N.J. Super. 79 (App. Div. 2004); State v. Tamburro, 137 N.J. Super. 51 (App. Div. 1975).**

Withdrawal of a guilty plea is not an absolute right; it is a matter within the discretion of the court. See, **State v. Simon, 161 N.J. 416, 445-446 (1999).** In **State v. Herman, 47 N.J. 7, 76-77 (1966)** the New Jersey Supreme Court stated:

> In exercising its discretion the court must weigh the policy considerations which favor the finality of judicial procedures against those which dictate that no man shall be deprived of his liberty except...after entry of a plea of guilty under circumstances showing that it was made truthfully, voluntarily and understandingly. **[47 N.J. supra at 76-77].**[6]

## II. The Plea Was Involuntarily Entered And Effected A Manifest Injustice In Violation of Due Process

In **State v. Bellamy, 178 N.J. 126, 134 (2003),** the New Jersey Supreme Court restated that "a defendant has the right not to be misinformed about a material element of a plea agreement." So too, the Court in **Bellamy** specifically determined in the context of entry of a guilty plea that "fundamental fairness requires that the trial court inform a defendant of the

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[6] In **State v. J.J., supra**, the Court stated that the defendant must demonstrate the misinformation, prejudice associated with enforcement of the plea, and that knowledge of those consequences would have impacted the decision to plead.

possible consequences under the [civil commitment] Act." **178 N.J. supra at 138**. The **Bellamy** Court stated:

> A defendant who has committed a predicate offense may be faced with commitment under the Act for a period in excess of his or her sentence...[The court rule] requires the court to determine whether a defendant clearly understands the nature and the consequences of the plea. **[Id.]**

Unlike **Bellamy,** in the case at bar there was a more egregious violation than simple failure to advise petitioner that he may be exposed to post-ADTC civil commitment. Petitioner was affirmatively misadvised both by the court and defense counsel that the extent of the custodial consequences of the plea would be to serve 4 years prior to a release on parole. In fact, defense counsel specifically advised petitioner that the civil commitment statute did not apply.

The decisions in **Nichols** and **Bellamy**, read in **pari materia**, clearly establish that the affirmative misadvice at issue rendered the plea involuntary and effected a manifest injustice. Indeed, **Nichols** clearly established this principle of law as to misadvice prior to the decision in **Bellamy.** [7] Simply stated, had the New Jersey

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[7] The court below failed to apprehend the limited nature of our reliance on **Bellamy**. The general holding in **Bellamy** as to civil commitment is that the defendant is to be informed on the record. In terms of authoritative application of the specific notice requirement, the ruling

Supreme Court not decided **Bellamy**, petitioner would be entitled to withdraw his plea on the basis of the ruling in **Nichols**. See, **United States v. Williams, 510 F.3d 416 (3 Cir. 2007)**.

The court clearly erred in refusing to permit petitioner to withdraw his involuntarily entered guilty plea. Both his right to be properly advised by counsel, and the concomitant right to not be misadvised by the court, were violated. A manifest injustice was effected in that the guilty plea has been used as the predicate offense for a civil commitment which may extend to life confinement.[8] See, **State v. Slater, 198 N.J. 145 (2009); United States v. Doe, 112 F. Supp. 2d 398 (D.N.J.2000)**.

## Point II

## Petitioner Was Denied Effective Assistance Of Counsel Because Of Misadvice Concerning The

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does not extend back to petitioner's plea. However, **Bellamy** does not impact the longstanding understanding that material misadvice vitiates a plea. Pre and post-**Bellamy** law requres that petitioner is permitted to withdraw his plea.

[8] This Court must find manifest injustice as a fact and remedy this violation of due process. See, **State v. Johnson, 182 N.J. 232 (2005)** (Mistaken belief or lack of knowledge must be material to the decision to plead guilty), **State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003)** (Even misinformation about a collateral consequence may vitiate a plea if the consequence is a material element of the plea); **State v. J.J., supra at 99 (App. Div. 2007)** (plea vitiated because defendant not told that community supervision provision of his plea would prevent him from living with his new wife and child). Fundamental fairness demands no less.

## Exposure To Post-Imprisonment Civil Commitment

### i.

### Introduction

Petitioner was clearly denied effective assistance of counsel. He entered a guilty plea on the mistaken advice of counsel that he would not be exposed to civil commitment because of the conviction herein of sexual assault. Counsel testified at the hearing below and admitted under oath to misadvising petitioner. Contrary to the advice, the offense to which petitioner pleaded guilty was thereafter used as the predicate offense for an actual civil commitment. Counsel's failure to provide correct advice concerning this consequence denied petitioner the "adversarial proceeding to which [he] was entitled". See, **State v. Fritz, 105 N.J. 42 (1987).**; **United States v. Cronic, 440 U.S. 648 (1984); Strickland v. Washington, 445 U.S. 688 (1984).**

### a. The Standards Set Forth In Cronic And Strickland

In **United States v. Cronic supra**, and **Strickland v. Washington, supra,** this Court established uniform principles of law to be applied in reviewing ineffective assistance of counsel claims. In **Cronic**, the Court stated that "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." **466 U.S. supra at 656-657**. Read in

**pari-materia, Cronic** and **Strickland** hold that "counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." **Id.**

To prevail on a motion for remedy on the ground of incompetent counsel, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id.** A reasonable probability is a probability sufficient to undermine confidence in the outcome. **Id.** We emphasize that the **Cronic/Strickland** standards continue to factor in the basic premise that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." **Strickland v. Washington supra at 688.**

b. Counsel Was Clearly Ineffective

Counsel was clearly ineffective as that principle of constitutional law is defined within **United States v. Cronic, supra,** and **State v. Fritz, supra.** Counsel's representation, objectively reviewed, deprived petitioner of an adversarial proceeding wherein a result was achieved upon which justifiable reliance may be placed. **Strickland v. Washington, supra.** The reasonable probability is that civil commitment proceedings would have been avoided with effective counsel. Succinctly stated, counsel's inexcusable failure to secure accurate information "materially contributed to the conviction." **State v. Fritz, supra at 84.**

Here "a [defendant faces loss of liberty up to life] because he [did not] know how to [avoid

it]". **State v. Sugar, supra at 84.** Had he been provided "the guiding hand of counsel, [petitioner] would [not be civilly committed]". **State v. Fritz, supra at 59. State v. Sugar, supra at 59; State v. Sugar, supra at 84.** See, **State v. Burford, 163 N.J. 16 (2000)** (Defendant must be informed of any period of parole ineligibility).

**1. The Misadvice**

This matter is similar to **State v. Garcia, 320 N.J. Super. 332, 339 (App. Div. 1999)**. In **Garcia**, the state court stated that a "defense attorney during the plea process can provide inadequate assistance of counsel by misinforming his or her client." **Id.** The court ruled that "guilty pleas can be vacated because of misinformation." **Id.** The defendant in **Garcia** was misadvised by his counsel as to the probability of deportation because of his guilty plea. Like the petitioner in **Garcia, supra,** petitioner has clearly been substantially prejudiced. The **Garcia** Court stated:

> Garcia's deportation under the circumstances of this case, has, in effect, converted his eleven-year sentence to life, possibly without parole unless INS or Cuba modifies its deportation policies. [**32 N.J. Super. supra at 341**].

In sum, petitioner's civil commitment "under the circumstances of this case, has, in effect, converted his [four year] sentence to [potentially] life, possibly without parole." See, **State v. Garcia, supra at 341.**

In **Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473 (2010)**, this Court ruled consistently with the New Jersey Court's decision in **Garcia, supra**. This Court in **Padilla** ruled as a matter of federal law that the defendant's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. **130 S.Ct. supra at 1478**. So too, this Court previously enunciated the clear principle that "before deciding whether to plead guilty, a defendant is entitled to the effective assistance of counsel." **McMann v. Richardson, 397 U.S. 759, 771 (1970).**

Misadvice concerning "deportation as a consequence of a criminal conviction is, because of the close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." **Padilla v. Kentucky, supra at 1482**. And, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. **Id at 1482**.

Advice or misadvice concerning the possibility of civil commitment must be similarly viewed. The collateral versus direct distinction is thus ill-suited to evaluating a **Strickland** claim concerning the specific risk of civil commitment. **Id.** This consequence, like deportation, bears a close connection to the criminal process. **Id.** Indeed, it is inextricable.

Moreover, the state courts of New Jersey now require specific and unequivocal advice regarding the exposure to post-imprisonment civil commitment. See, **State v. Bellamy, supra**. Simply put, "preserving the client's right to

[assess potential civil commitment] may be more important to the client than any potential jail sentence." **Padilla v. Kentucky, supra at 1483.**

**2. The Time Bar**

In its determination that the Petition is time-barred, the court below completely miscalculated the balance of applicable factors. Petitioner was misinformed by the sentencing court that no consequences beyond 4 years confinement and Megan's law registration were at issue; defense counsel misadvised petitioner that the civil commitment law did not apply to him, and the Public Defender advised him that the 5 year limitation commenced after his actual commitment. Despite this, the court found a lack of excusable neglect.

That calculus did not properly incorporate the fact that petitioner's filing of a Petition one year after the limitation is not excessive in these circumstances. The State is clearly not prejudiced because the uncertainty as to the present availability of the victim is the same position that it was in at the time of the plea. The victim had indicated an unwillingness to cooperate. So too, petitioner's claim is abidingly important. He is now civilly committed for a period up to life. See, **State v. DiFrisco, 187 N.J. 156 (2006); State v. Milne, 178 N.J. 486 (2004).** The interests of justice demanded relaxation of the time limitation. **State v. Goodwiin, 173 N.J. 583 (2002).**

**ii.**

**The Required Ruling**

This Court should rule as a matter of federal law that a criminal defendant must be correctly advised by counsel concerning the possibility of civil commitment for life post-imprisonment for a sex offense. When a criminal defense attorney is aware that a client has been convicted of a sex offense, the attorney should advise the client that a criminal conviction may have adverse consequences under the civil commitment laws. By putting the client on notice of the danger of possible civil commitment, such advice would significantly reduce the chance that the client would plead guilty under a mistaken promise. **Padilla v. Kentucky, 130 S.Ct. supra at 1494.**

## Conclusion

For the foregoing reasons, petitioner should either be permitted to withdraw his plea because of the misadvice of the court and defense counsel that he would not be confined beyond four years prior to being placed on parole; or the plea should be vacated due to defense counsel's misadvice that the Act concerning civil commitment did not apply to him. Petitioner has clearly been denied due process and the plea effected a manifest injustice.

Respectfully submitted,

Alan Dexter Bowman
Attorney for Petitioner
Dated: July 24, 2010

SUPREME COURT OF NEW JERSEY
C-701 September Term 2009
065192

STATE OF NEW JERSEY,

PLAINTIFF-RESPONDENT,

V.

ON PETITION FOR CERTIFICATION

J.Z.,

DEFENDANT-PETITIONER.

**Filed March 4, 2010**
**Clerk s/ Mark Neary**

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-004432-07 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 2nd day of March, 2010

s/ Mark Neary
CLERK OF THE SUPREME COURT

APPENDIX A

The foregoing is a true copy of the original on file in my office.
s/ Mark Neary
CLERK OF THE SUPREME COURT
OF NEW JERSEY

**RECORD IMPOUNDED**

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4432-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J. Z.,

Defendant-Appellant.

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Argued March 9, 2009 - Decided November 9, 2009

Before Judges Carchman, R. B. Coleman and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 00-05-0474.

Alan Dexter Bowman argued the cause for appellant.

James F. Avigliano, Passaic County Prosecutor, argued the cause for respondent (Marc A. Festa, Senior Assistant Prosecutor, of counsel and on the brief).

APPENDIX B

PER CURIAM

Petitioner J.Z. appeals from an order, dated April 11, 2008, denying his petition for post-conviction relief (PCR). In his appeal, petitioner advances two points for our consideration:

POINT I: THE COURT BELOW WAS REQUIRED [TO] PERMIT APPELLANT TO WITHDRAW HIS PLEA OF GUILTY AS A MATTER OF LAW.

POINT II: THE GUILTY PLEA WAS REQUIRED TO BE VACATED BECAUSE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

We do not discuss those points specifically because we affirm, substantially for the reasons expressed in the succinct, but thorough letter opinion, dated April 11, 2008, issued by Judge Philip H. Mizzone, Jr. We add only these brief comments.

J.Z. was indicted on May 1, 2000, and charged with second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count one); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) and N.J.S.A. 2C:14-2(c)(1) (count two); and third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count three). On September 26, 2000, he pleaded guilty to count one, second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1), and in exchange, the State agreed to recommend seven years in state prison with eighty-five percent of that term to be served

before he would be eligible for parole. Notwithstanding the State's initial recommendation, the court indicated at the plea hearing, without objection from the State and with concurrence from the victim, that it was inclined to sentence J.Z. as a third-degree offender and would, subject to the Adult Diagnostic Treatment Center (ADTC) evaluation, impose a term of four years in prison, with an eighty-five percent parole disqualifier.

Notably, the plea agreement required, however, that J.Z. be evaluated at the ADTC, and the voir dire of J. Z. by defense counsel included the following exchange:

> Q. You do understand that you will be going to a treatment center for evaluation; is that right?
>
> A. Yes, sir.
>
> Q. And you understand that according to the evaluation that will determine when and if you would receive parole, that you are not under the normal parole guidelines of the State of New Jersey; do you understand that?
>
> A. Yes.

J.Z. was evaluated on December 20, 2000 and found to meet the criteria for sentencing under the New Jersey Sex Offender Act, N.J.S.A. 2C:47-1 to -10. More particularly, the evaluation

revealed that his conduct was characterized by a pattern of repetitive, compulsive behavior, that he is amenable to sex offender treatment and that he is willing to participate in such treatment.

On February 2, 2001, J.Z. was sentenced in accordance with the agreed terms to four years at ADTC with eighty-five percent parole disqualification. Megan's Law also applied. Counts two and three were dismissed in accordance with the plea agreement.

No direct appeal was taken; however, on or about May 18, 2007, more than six years after the sentencing hearing, J. Z. filed a petition for PCR. In that petition, he alleged that at the time of entry of the guilty plea, his attorney gave him inadequate or erroneous advice concerning the consequences of his being found eligible for confinement at the ADTC. In addition to his oral response during the voir dire at the plea hearing, J.Z. recorded a "yes" answer to question eight on the plea form containing additional questions for sexual offenses committed after December 1, 1998. Nevertheless, petitioner contends he did not understand he could be subject to involuntary civil commitment after he completed his four-year sentence. Question eight on the form asks:

> Do you understand that if you are confined at the Adult Diagnostic and Treatment Center, or any other facility for commission of a sexually violent offense, you may upon completion of your total confinement be involuntarily committed to another facility, if the Court finds, after a hearing, that you are a sexually violent

predator in need of involuntary civil commitment?

J.Z. contends that his attorney advised him that the civil commitment provisions referenced in question eight on the form did not apply to him. J.Z. further contends he was never advised of the prospect of civil commitment, and that he would not have pled guilty had he understood the true consequences. He claims he first became aware in early 2003, that he was subject to possible involuntary civil commitment.

On October 22, 2003, the State did, in fact, petition for J.Z.'s involuntary civil commitment under the New Jersey Sexually Violent Predators Act (SVPA), N.J.S.A. 30:4-27.24 to - 27.38. In doing so, the State relied, in part, upon the guilty plea to the sexual assault as the predicate offense. On October 30, 2003, an Order for Temporary civil Commitment of petitioner was entered, and on June 2, 2005, an order of civil commitment was entered, determining that petitioner had been properly characterized as a sexually violent predator. Petitioner appealed, and, on April 18, 2007, the order of civil commitment was affirmed by another panel of this court.

Thereafter, petitioner filed his PCR petition, which was denied by the April 11, 2008 order from which petitioner now appeals. The PCR court reasoned that (1) the petition is time-barred; (2) petitioner took the benefit of the plea deal, which included a sentence one degree lower; and (3) the State would be unfairly prejudiced if the plea were withdrawn at this late date. We agree with the PCR judge's conclusion that the

petition was untimely under Rule 3:22-12(a). That rule provides, in pertinent part, that:

> No...petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect.

Petitioner was sentenced on February 2, 2001. He did not file the petition until May 9, 2007, more than five years later. He does not allege excusable neglect. Instead, he argues that the appellate order affirming his involuntary civil commitment triggered the time period under Rule 3:22-12(a) for the filing of his PCR petition. Petitioner is wrong, as a matter of law.

"[P]ost-conviction relief is not a substitute for direct appeal..." State v. Echols, 199 N.J. 344, 357 (2009). J.Z.'s PCR petition is, in effect, a challenge to the sentence. To the extent the petitioner alleges ineffective assistance of counsel, he is required to show that "defense counsel's performance was deficient," and that "there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Preciose, 129 N. J. 451, 463-64 (1992) (quoting Strickland v. Washinigton, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)); see also State v. Fritz, 105 N.J. 42, 58 (1987) (adopting the two-pronged test formulated in Strickland). It is plain from a review of the facts, viewed favorably to petitioner, that he cannot show that the result

would have been different if defense counsel had more clearly informed him of the possible consequence of future civil commitment for an indefinite period.

In State v. Bellamy, 178 N.J. 127, 131 (2003), the Supreme Court held that even though civil commitment under the SVPA is a collateral consequence of a defendant's plea, rather than a direct or penal consequence, "fundamental fairness requires that prior to accepting a plea to a predicate offense, the trial court must inform a defendant of the possible consequences [of future commitment for an indefinite period, up to and including lifetime commitment] under the Act." In that same opinion, however, the Court limited the retroactive applicability of the newly announced rule. Id. at 142. The Bellamy rule applies to that case and to those cases pending on the date of the opinion (December 11, 2003), in which the defendant had not exhausted all avenues of direct review. Id. at 143. See also In re Civil Commitment of J.M.B., SVP-358-04, 197 N.J. 563, 575 (2009) ("[A]lthough...a person whose convictions may subject him or her to commitment under the SVPA [must] be informed of such consequence prior to entering a guilty plea, the lack of that notice does not preclude application of the SVPA to those whose convictions preceded the Bellamy holding.").

J.Z.'s petition was properly denied as untimely. Petitioner's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office
CLERK OF THE APPELLATE
DIVISION